Certified 2/9/04

[C.R. #60] APP. 1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

FRANK MARVIN PHILLIPS, JR.	)	
	)	Civil No. 01-1252-HA
Plaintiff,	)	
	)	
v.	)	
	)	ORDER [of clarification]
LYNN HUST	)	
	)	
Defendant.	)	

HAGGERTY, Chief Judge.

PROCEDURAL BACKGROUND

Plaintiff, who is proceeding *pro se*, brings this civil rights action pursuant to 42 U.S.C. § 1983 alleging that the defendant, Lynn Hust, violated the First Amendment by impeding his rights to freely associate, communicate and correspond with others (Claim One); by interfering with his First and Fourteenth Amendment rights to access the courts (Claim Two); and by

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retaliating against him when he attempted to exercise his constitutional rights to free speech, to access the courts, and to utilize the prison grievance system (Claim Three). (See Am. Compl. (#25) at 6; see also Pl.'s Resp. to Def.'s Concise Statement (#41) at 11-12.) Currently before the court is defendant's motion for reconsideration or clarification (#50) of this court's Opinion and Order of March 31, 2003 (#49) as to Claim Two.

In my prior Opinion and Order, I denied defendant's motion for summary judgment and granted in part plaintiff's cross-motion for summary judgment with respect to Claim Two. (Op. and Order (#49) at 43.) I found that defendant was not entitled to qualified immunity because she was willfully blind to the applicable law requiring her to furnish plaintiff with the tools or services to give him the capability to access the courts, and because she failed to respond to plaintiff's request to bind his brief in a manner that a reasonable official in her position would have responded. (Id. at 33-34.) On the merits of Claim Two, I ruled that defendant violated plaintiff's constitutional right to access the courts because, as a matter of law, the denial of available tools or services to bind his brief rendered plaintiff substantially incapable of complying with the applicable Supreme Court Rule. (Id. at 39-40.) The remaining issues regarding plaintiff's damages were reserved for trial.

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(See id. at 40.)

I have reviewed the memoranda submitted by the parties, and conclude that defendant has failed to show any reason that would justify relief upon reconsideration. Accordingly, I reaffirm my Opinion and Order of March 31, 2003. For the reasons set forth below, defendant's motion for reconsideration (#50) is denied; and defendant's alternative motion for clarification is granted to the extent that this order contains further discussion of this court's prior rulings regarding Claim Two.

APPLICABLE LEGAL STANDARD

"A district court may reconsider its grant of summary judgment under either Federal Rule of Civil Procedure 59(e) (motion to alter or amend a judgment) or Rule 60(b) (relief from judgment)." School Dist. No. 1J, Multnomah County, Oregon v. ACandS, Inc., 5 F.3d 1255, 1262 (9th Cir. 1993) cert. denied, 512 U.S. 1236 (1994); see also Fuller v. M.G. Jewelry, 950 F.2d 1437, 1441-42 (9th Cir. 1991) (where moving party did not indicate which Federal Rule of Civil Procedure governed the motion, a motion for reconsideration of summary judgment was appropriately brought under either Rule 59(e) or Rule 60(b)). Under either theory, a motion for reconsideration is committed to the discretion of the trial court. School Dist. No. 1J, 5 F.3d at 1262.

Defendant did not specify which Federal Rule of Civil

Procedure she intends to apply to her motion for reconsideration. However, because defendant's motion was filed more than ten days after the challenged summary judgment rulings were entered, so that the motion would be untimely under Rule 59(e), this court will apply the standards used to evaluate a motion for reconsideration brought pursuant to Rule 60(b). Provided that a Rule 60(b) motion is made "within a reasonable time," a court may relieve a party from a final judgment or order if that party can establish one of the following grounds:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged . . . or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b); see also School Dist. No. 1J, 5 F.3d at 1263 (applying Rule 60(b) grounds for relief to motions to reconsider summary judgment determinations).

DISCUSSION

Defendant moves this court to reconsider its Opinion and Order denying her motion for summary judgment on the basis of qualified immunity, and granting plaintiff's cross-motion for summary judgment as to liability regarding Claim Two. Defendant argues that plaintiff's inmate communication ("kite") lacked essential details and that those omissions impeded her, as they

would any other reasonable corrections officer, from timely and effectively responding to his request to use the comb punch machine. Defendant also argues that even if she had known the destination of plaintiff's brief, U.S. Supreme Court Rule 33.2 (hereafter "Rule 33.2") may not reasonably be read to require that an inmate's briefs be comb bound. In the alternative, she contends that *pro se* litigants are not strictly bound to the technical requirements of Rule 33.2, and that in fact the U.S. Supreme Court disfavors and discourages comb binding. (See Def.'s Mot. for Recons. (#50) at 4 & Ex. 107, Aff. of Brenda Coughennower, ¶¶ 7-9.) Lastly, Defendant seeks clarification of this court's interpretation of Rule 33.2.

Plaintiff argues that this court neither inferred, found, nor stated that comb binding was specifically mandated by Rule 33.2. He contends that Claim Two is not about the specifics of how a brief might be bound; instead, it is about whether a state actor provided adequate access to the courts given the circumstances of his case. (See Pl.'s Resp. to Def.'s Mot. for Recons. (#52) at 1-2.) Plaintiff argues that this court did not err in its finding that defendant behaved unreasonably in her response to his request for access to available law library services in order to comply with an applicable U.S. Supreme Court rule.[1] (See id. at 2-3.) Lastly, plaintiff argues that

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[1]Plaintiff points out that within the prison facility, items such as rubber bands, loose staples, metal rings, string, and

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defendant's current motion attempts to introduce new information in an affidavit that could have been obtained prior to this court's summary judgment rulings; therefore, the evidence is untimely and not admissible to satisfy the requirements of Rule 60(b)(2). (See Pl.'s Resp. to Def.'s Mot. for Recons. at 8.)

I. Extraordinary Circumstances to Justify Reconsideration

Defendant contends that this court interpreted the Rule 33.2 requirement that submissions be "stapled or bound" to mean that, as a matter of law, the defendant should have allowed the plaintiff to comb bind his materials because comb binding was mandated by this rule. (See Def.'s Mot. for Recons. at 1.) Defendant further argues that Rule 33.2 does not require materials submitted to the U.S. Supreme Court to be comb bound, and seeks reconsideration or clarification of the March 31, 2003 Opinion and Order because she believes that the court's holding rested on this point, so that Oregon Department of Corrections ("ODOC") staff members "now run the risk of civil suit if they do not provide spiral plastic binding (comb binding) for inmate briefs headed to the U.S. Supreme Court." (Id. at 5.) Defendant is incorrect.

This court previously found that defendant was willfully blind to the applicable Supreme Court authority defining her duty

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other potential binding materials, are all considered contraband; a voluminous document must be bound in the prison law library, or not at all. (See Pl.'s Resp. to Def.'s Mot. for Recons. at 2.)

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to provide prisoners with access to the courts; therefore, this court declined to grant her motion for summary judgment on the basis of qualified immunity because the doctrine does not protect the actions of an unreasonable official, or the official who is "plainly incompetent." (See Op. and Order at 33-34, citing Saucier v. Katz, 533 U.S. 194, 203 (2001).) I held that:

> "[a] reasonable official in defendant's position should know that if her actions could foreseeably result in causing an inmate plaintiff to miss a court filing deadline or violate a published court rule, thereby placing his claims in jeopardy of dismissal, such actions would be unlawful under the clearly established constitutional access to court standards set forth in Lewis. A reasonable law librarian, when faced with a question as to whether to provide a particular tool, such as comb binding, to an inmate who requested its use in connection with filing a court document, would have contacted a supervisor or requested advice from an Oregon Department of Justice attorney assigned to ODOC matters. Defendant Hust took neither precaution."

(Id. at 34).

The facts in this case led me to conclude that denying plaintiff access to the comb binding machine amounted to a denial of access to the courts under the general rule articulated in Lewis v. Casey, 518 U.S. 343, 356-57 (1996). (See Op. and Order at 32-33.) Specifically, I found as a matter of law that "to deny tools or services *such as* comb binding to an inmate plaintiff, so as to render him incapable of substantially complying with an applicable Supreme Court Rule, is to deny access to the courts under Lewis." (Id. at 33 (emphasis added).) I did not rest my finding on a interpretation that Rule 33.2 *italicized, emphasized*

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requires the comb binding of *pro se* petitions in general; rather, it was based on defendant's failure to take reasonable steps to facilitate plaintiff's access to the U.S. Supreme Court by providing available binding tools or services when the plain language of the applicable U.S. Supreme Court rule requires some form of binding.

The record on summary judgment did not show that the Snake River Correctional Institution's law library had a stapling apparatus capable of inserting a staple in the upper left-hand corner of a document that exceeded one hundred pages in length, that inmates would be permitted to use this apparatus, or that some other form of binding would be offered to inmates to permit them to comply with Rule 33.2. Plaintiff demonstrated that his document was too large to by secured by an ordinary staple; in his case, comb binding was shown to be the necessary, available, and reasonable alternative. This holding does not require ODOC staff members to provide comb binding for every inmate brief that is directed to the U.S. Supreme Court, and it is consistent with the plain language of the applicable state regulation, O.A.R. 291-139-0005, which sets forth the ODOC policy that inmates will be provided with "necessary supplies for the preparation and filing of legal documents with the court." (See Op. and Order at 32.) Accordingly, defendant has not demonstrated "extraordinary

circumstances" which would justify relief pursuant to Rule 60(b)(6). See Fuller, 950 F.2d 1442; see also Backlund v. Barnhart, 778 F.2d 1386, 1388 (9th Cir. 1985).

II. Newly Submitted Evidence

Defendant has submitted a new affidavit in her motion for reconsideration which suggests that Rule 33.2 does not require materials to be comb bound, and that the U.S. Supreme Court disfavors comb binding. (See Def.'s Mot. for Recons. at Ex. 107, Aff. of Brenda Coughennower.) To support a motion for reconsideration which seeks to overturn a summary judgment ruling based upon newly discovered evidence, the moving party is obliged to show not only that this evidence was newly discovered or unknown to it until after the ruling on the motion, but also that it could not with reasonable diligence have discovered and produced such evidence at the time the motion for summary judgment was filed. See Engelhard Industries, Inc. v. Research Instrumental Corp., 324 F.2d 347, 352 (9th Cir. 1963), cert. denied, 377 U.S. 923 (1964); see also School Dist. No. 1J, 5 F.3d at 1263 ("The overwhelming weight of authority is that the failure to file documents in an original motion or opposition does not turn the late filed documents into 'newly discovered evidence.'") (citations omitted). If the proffered evidence was available before the disposition of the motion for summary

judgment, then as a matter of law the moving party is not entitled to reconsideration based upon that evidence. Trentacosta v. Frontier Pac. Aircraft Industries, 813 F.2d 1553, 1557-58 n. 4 (9th Cir. 1987).

The information contained within Coughennower's affidavit could have been discovered with reasonable diligence and produced at the time the defendant's motion for summary judgment was filed, or in response to the plaintiff's cross-motion for summary judgment.[2] Defendant offers no reason why the Coughennower affidavit could not have been obtained prior to this court's ruling on the motions for summary judgment; therefore, as a matter of law, defendant is not entitled to reconsideration pursuant to Rule 60(b)(2) based on this evidence. See Trentacosta, 813 F.2d at 1557-58 n. 4 (9th Cir. 1987)

CONCLUSION

Based on the foregoing, defendant has failed to establish any Rule 60(b) grounds to justify relief upon reconsideration of this court's March 31, 2003 Opinion and Order denying defendant's

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[2]I note also that the statements attributed Mr. Jeff Atkins, Supervisor of the Case Analyst Division of the U.S. Supreme Court, in support of defendant's interpretation and suggested application of Rule 33.2, are hearsay evidence contained within the Coughennower affidavit because they are out-of-court statements, made by someone other than the affiant, offered to prove the truth of the matter asserted. See Fed. R. Evid. 801. Atkins's statements are not admissible absent a showing that they fall into a recognized exception to the hearsay rule; besides being untimely, these statements should have been presented in an affidavit executed by Atkins. See generally, Fed. R. Evid. 802 - 807.

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motion for summary judgment and granting in part plaintiff's cross-motion for summary judgment regarding Claim Two. Accordingly, I reaffirm my original Opinion and Order of March 31, 2003. Defendant's motion for reconsideration (#50) is DENIED; defendant's alternative motion for clarification (#50) is GRANTED to the extent that this order contains further discussion regarding Claim Two.

IT IS SO ORDERED.

DATED this _9___ day of February, 2004.

_____/s/Ancer L.Haggerty_
Ancer L. Haggerty
United States District Judge

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK MARVIN PHILLIPS, JR.	)	
	)	(U. S. Dist. No. 01-1252-HA)
Plaintiff-Appellee,	)	
	)	**CASE NO. 04-36021**
vs.	)	
	)	REQUEST FOR SANCTIONS
LYNN HUST, Snake River Corr.	)	
Inst. Staff,	)	
	)	
Defendant-Appellant.	)	

In a prior Motion for Extension of Time, appellee complained that appellant had failed to provided required documents in this case which were dispositive of of the issues she raised on appeal; and, that she had worked a type of fraud upon this court. This Court placed the matter before the panel assigned to decide the case as a Request For Judicial Notice. (See Order of March 16, 2005). Appellee feels that additional evidence of bad-faith pleadings by appellant, disclosed below, should be included in the request for judicial notice; and, sanctions should be imposed on appellant. Appellee moves therefor.

Distorted/Misleading Pleading by Defendant/Appellant

Covered in the Appellee's Answering Brief, but helpful as a reminded here, appellant stated at p.16 of her opening brief:

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Frank Phillips

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> "The district court's ruling rests on the **Court's belief** that the Supreme Court's rules require petitions for certiorari submitted in forma pauperis to be comb bound. See Cr 49 at 29-30; ER 96-97." (Op Br 16; Emphasis added).

The court held no such "belief." The assertion is a lie, patently false. See CR 60; Supp ER 15-25. (Also see, Section II, Appellee's Br at 9: "THE DISTRICT COURT DID NOT HOLD THAT COMB BINDING WAS SPECIFICALLY MANDATED BY RULE"). The only way the appellant would dare to make such an assertion was to deprive this court of the district court's "clarification", CR 60, discussed in the "Request for Judicial Notice" already on file. (Appellee provided the document, CR 60, at Supp ER 15-25). The matter of concern, now, is the manner of citation used by appellant to support the erroneous conclusion, above, about the court's "belief." She cites to "CR 49 at 29-30; E.R. 96-97" as authority. But, nothing whatsoever on those pages would lead to such a wild-eyed, erroneous assertion. And, the appellant's false claim was no mistake, for she again asserted:

> "A review of the controlling Supreme rules shows that the premise for the district court ruling---that the Supreme Court's rules require comb binding---is simply wrong. Accordingly, there is no basis for the district court's decision." (Op Br 17; emphasis added).

There is no such district court ruling, nor premise, and appellant cannot support those fabrications. (See Order & Op. CR 49; ER 68-110; and Order (of clarification) CR 60; Supp ER 15-25). Sanctions should be granted and appeal dismissed.

Exacerbating the fraud, the appellant falsified a citation, to lend support to to her false allegations of error which she attributes to the judge, i.e., the so-called "belief," "premise," and "ruling," supra, to wit:

> "see C.R. 49 at 32-33; E.R. 99-100("comb binding *** was essential to plaintiff's filing"; "to deny *** comb binding to an inmate plaintiff, so as to render him incapable of substantially complying with an applicable Supreme Court Rule")." Op Br 17, lns. 1-4.

It is indisputable that appellant intended, through that citation, to persuade this court to buy into the falsity, i.e., that Judge Haggerty believed in, relied on, and ruled in favor of some imaginary mandate that comb binding, specifically, was required. To give this court a clear impression of what appellant tried to pull off, the entire citation, from which appellant pulled her few words, is reproduced here, disclosing the treachery (Appellant's few words are emphasized):

> "The 'necessary supplies' plaintiff needed in order to prepare and file his petition with the Supreme Court, in accordance with that Court's applicable Rules, included access to use the comb binding machine [punch] present and available in the SRCI law library. To deny access to the **comb binding** service that **was essential to plaintiff's filing** of habeas corpus appeal, was to deny access to the courts under the general rule articulated in Lewis, which requires that state prisons give inmates the capability to 'file nonfrivolous claims challenging their convictions or conditions of confinement.' 518 US at 356-57. This court finds as a matter of law that **to deny** tools or services such as **comb binding to an inmate plaintiff, so as to render him incapable of substantially complying with an applicable Supreme Court Rule,** is to deny access to the courts under Lewis. See id." (CR 49 at 32-33; ER 99-100).

The dearth of words pulled from that long paragraph by appellant, striped of context, exhibits an abuse of the citation process to the nth degree. Whereas the judge was focused on the defendant's unlawful act of denying "tool or services **such as** comb binding" (emphasis supplied), appellant changed the context into a "ruling" that is said to have specifically mandated comb binding.

Far from mandating comb binding, the court found that SRCI had chosen comb binding as one way to comply with court rules and, he found that that service was both "present and available in the SRCI law library." Supra. The court chastised defendant ONLY because she refused to dispense the existing comb-binding service. In the judge's clarification (CR 60; Supp ER 15-25), he cited specifically to the last five lines of the paragraph that is in controversy (above), and he emphasized, in italics, the words "**such as**" (CR 60 at 7; Supp ER 21), so as to prevent the very distortion that appellant tried to pull off in this appeal, i.e., some false notion that comb binding was specifically mandated. **In short, if the appellant can get this court to buy into that distortion, she wins her appeal.**

The better part of appellant's arguments in her brief are long-winded repeats of the contentions she raised in her Def's Motion for Reconsideration/Clarification (CR 50) and answered in the "Clarification" (CR 60; Supp ER 15-25). It appears

that this appeal is a sham in that appellant evaded the clarification and its dispositive nature.[1] The combination of leaving out the trial transcript, evading the "Clarification" by not providing it to this Court, and the distortion of citations, should sufficiently show that the appellant did not plead in good faith.

Respectfully submitted,

Frank M. P. Phillips Jr.

Frank Marvin Phillips, Jr.
Appellee Pro Se

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1 It is not surprising, to this party, that state's counsel corrupted the pleadings in this case. State's counsels seems to think that they can take advantage of prisoner litigants and that either (#1) the prisoner does not detect the intentional "defects" or, (#2) the prisoner will be unable to get the court's attention and will fail to persuade the court that the "defects" are excusable.

In Phillips v. Maass, (88-4218; 9th Cir. 1988), a federal habeas corpus case, state's counsel confused the record so well in district court that the trial judge fell victim to the state's assertion that petitioner had not exhausted his claims and she dismissed. All it would have taken was a look at the State Public Defender's brief, and the Pro Se Supplemental Brief, to determine what had been raised in the state proceedings and exhausted. On appeal, here, appellant was able to untangle the record and the state quickly conceded: "[P]etitioner must be deemed to have satisfied the exhaustion requirement and to be entitled to a determination by the district court of the merits of his claims." Brief of the Appellee, p.5. The state then recommended, "[T]he judgment of the district court should be reversed, and the case should be remanded for further proceedings." Ibid. First, the state mislead the district court judge, and then, the state blamed **her** for committing error.

In this case, the state tried to put words in Judge Haggerty's mouth, and then, based on those fabrications, tried to blame the judge for committing error. This court should sternly reprimand appellant for this misconduct.